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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

LUCERO CARRERA,

Defendant and Appellant.

G051697

(Super. Ct. No. 12CF1980)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Thomas M. Goethals, Judge. Reversed and remanded.

William J. Capriola, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris and Xavier Becerra, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Christopher P. Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

Lucero Carrera was charged with first degree murder (Pen. Code, §§ 187, subd. (a), 189; count 1; all further statutory references are to the Penal Code unless otherwise stated) and assault causing the death of a child (§ 273ab, subd.(a); count 2) in connection with the death of her two-month-old daughter, Kimberly.

Carrera entered pleas of not guilty and not guilty by reason of insanity. A jury found Carrera guilty of both charges and legally sane during the commission of the crimes. The court imposed indeterminate terms of 25 years to life on both counts, but stayed sentence on count 2 under section 654.

Carrera asserts the court erred by failing to give a pinpoint instruction on mental impairment at the guilt phase. (CALCRIM No. 3428.) We conclude the court had no duty to give this instruction absent a request from defense counsel. However, counsel's failure to request it after presenting expert testimony about Carrera's mental impairment constitutes prejudicial ineffective assistance of counsel and reversible error.

Carrera also asserts the court violated Evidence Code section 352 by admitting evidence she may have exaggerated her mental illness for her own benefit, or malingered, during both guilt and sanity phases, and the cumulative effect of the errors rendered her trial fundamentally unfair. Our conclusion the judgment must be reversed and remanded for a new trial moots these additional points.

FACTS

1. Guilt Phase

a. The People's case

In 2012, then 28-year-old Carrera lived with her mother, Estela Montalvo, and another woman, Sylvia Bermudez. She gave birth to a baby girl, Kimberly, in April of that year. Due to Carrera's life-long struggle with mental illness, Montalvo was the primary caregiver. Montalvo said Carrera treated the baby well.

On the afternoon of June 29, Montalvo decided to go to the grocery store. Carrera was home, and Montalvo left Kimberly asleep in her crib. When Montalvo

returned from the store, Kimberly was not in her crib. Montalvo asked Carrera about Kimberly, and Carrera said, “Well, I drowned her.” Upon investigation, Montalvo found Kimberly floating face down in the bathtub, and she called the police.

The Santa Ana police officer who responded to Montalvo’s emergency call attempted to resuscitate Kimberly, but to no avail. An autopsy confirmed drowning as the cause of death. The officer heard Montalvo say something to Carrera about not needing to hurt the baby. Montalvo told Bermudez, “Look what this bitch did with my girl.”

When the officer attempted to question Carrera, she denied knowing anything about what happened. The officer saw an empty bottle of 300 milligrams of Seroquel tablets in the bathroom. Seroquel is an antipsychotic medication, and overdoses can be fatal. When asked, Carrera admitted taking at least 15 pills, and paramedics decided she needed to be hospitalized.

The first paramedic to arrive thought Carrera seemed aware of her surroundings, although he did admit she was somewhat uncooperative. During the ride to the hospital, Carrera showed no emotion and did not ask about the baby. She went into respiratory arrest and had to be intubated for three days. Seroquel was the only drug in Carrera’s system.

Detective Eddie Nunez interviewed Carrera at the Santa Ana Police Department immediately after her release from the hospital. The interview was conducted in Spanish. The jury saw the videotape of the interview, but listened to an English translation of an audio recording.

Nunez advised Carrera of her *Miranda* rights. (*Miranda v. Arizona* (1966) 384 U.S. 436.) Carrera acknowledged each right, and she replied affirmatively when asked if she understood.

Nunez first asked for Carrera’s address. Carrera said she had been sharing a bedroom with her mother for the last four months, but she only knew it was somewhere

in Santa Ana. Carrera asked Nunez where they were, and he told her the Santa Ana Police Department. Carrera said she remembered being at the hospital for two or three days, and she knew it was because she tried to commit suicide with Seroquel.

Carrera did not respond when Nunez asked her “in what manner did you do harm to Kimberly?” The reporter’s transcript shows Carrera paused several times during the interview, waiting sometimes as long as 30 seconds before responding to Nunez’s questions. On occasion, she did not respond at all. Eventually, when Nunez asked, “in what manner did you do harm to your baby?” Carrera said, “I drowned her in the bathtub.”

Over the next few minutes, and with frequent 10- to 30-second pauses, Carrera told Nunez she stopped taking her medication about a month before Kimberly’s death. Carrera said she half-filled the full-sized bathtub, removed Kimberly’s clothing, and put Kimberly into it. Carrera held Kimberly under water until she stopped breathing, even though Kimberly struggled. Carrera left Kimberly’s body floating in the bathtub.

Nunez asked Carrera, “do you know what you did, was it bad? Is it something bad or something good?” Carrera, again, after more than one long pause, and prompted by Nunez said, “Bad.” Nunez asked Carrera when she decided to kill herself and Kimberly. After a 30-second pause, Carrera said, “I didn’t have it planned.”

Carrera explained she felt “no good for nothing.” Nunez’s tried to follow up, but Carrera did not immediately respond. After a minute or two, Carrera said, “I do everything wrong.”

When asked why she wanted to harm herself and Kimberly, Carrera said, “So she wouldn’t suffer what I suffered.” Carrera also wanted to prevent Kimberly from having a mother who “always comes out and goes in to [sic] psychiatric hospitals.” Carrera said she intended to commit suicide, and she wanted to take Kimberly with her to save her child from a life of pain.

Carrera also admitted Montalvo usually bathed the baby because Carrera “was afraid of harming her.” Carrera said she loved Kimberly, but she was also annoyed by her crying sometimes. Carrera regretted what she had done.

Montalvo testified Carrera had suffered with mental illness since high school, and she had been hospitalized five times for mental health reasons. According to Montalvo, Carrera had returned to California from Las Vegas a few months before Kimberly’s birth. At the time, Carrera was not eating or bathing. A clinic doctor prescribed medication, but she stopped taking it shortly before Kimberly’s birth.

b. Defense

Dr. Jody Ward, a clinical and forensic psychologist, testified on Carrera’s behalf. In Ward’s opinion, Carrera drowned Kimberly in the midst of an episode of “bipolar disorder [with] severe . . . psychotic and catatonic features.” Ward based her opinion on Carrera’s extensive medical records, her interviews with Carrera’s family members and Carrera, and a review of the police reports.

Carrera was first hospitalized for mental illness after a teenage suicide attempt. Five or six hospitalizations for mental illness followed over the course of about five years.

One hospitalization followed reports of Carrera “hanging out in laundry rooms, bathing in the washing machines, giving sexual favors to gang members, acting very erratically, and also having voices and delusions that she was on a special mission or things like this.”

Ward believed Carrera was experiencing symptoms of bipolar disorder exacerbated or brought on by depression when she drowned Kimberly. As Ward testified, “there was evidence in the records that [Carrera] was very sad, very withdrawn. She kept to herself. She stayed in her room, just staring straight ahead most of the time. Didn’t interact with anyone else who was living in the home at that point. I know her mother had concerns about her being alone and being alone with the baby. There was

evidence that she was hearing voices to kill herself, certainly that she had suicidal ideation and then made a suicide attempt all at the time the drowning occurred.”

Carrera’s performance of goal-oriented tasks, like filling the bathtub, did not change Ward’s opinion. Ward explained, “the reactions or the actions taken are a result of the thinking that’s been disordered and distorted by the very, very severe mood swings and the psychotic symptoms that were happening at the time. So the person can still take action but the decision has been very distorted by the mental illness.”

Ward also pointed to Carrera’s behavior during the interview and said Carrera seemed to go along with whatever someone said to her, and she did not exhibit “a lot of volition or not generating her own speech or her own thinking in response to the police.”

In Ward’s opinion, Carrera had a significant documented history of mental health issues, including diagnoses of bipolar disorder, major depression with psychotic features, psychotic disorder not otherwise specified, and schizoaffective disorder, which are all diagnoses consistent with bipolar disorder with psychotic features.

When cross-examined, Ward admitted someone might mangle, or produce false mental symptoms, for some type of secondary gain. She knew some of Carrera’s relatives claimed Carrera used her mental illness to avoid responsibility. However, Ward had seen nothing in Carrera or her records to suggest she was malingering.

c. Closing Argument and Jury Instructions

At the conclusion of the guilt phase, the prosecutor argued Carrera committed premeditated murder when she drowned Kimberly. She asserted Carrera planned the killing and waited for her mother to leave their home. The prosecutor also pointed to some of Carrera’s statements and argued she may have considered killing Kimberly for some time.

Defense counsel conceded Carrera drowned Kimberly, but argued Carrera’s long-standing mental illness and delusions meant she did not form the premeditation or

deliberation necessary for first degree murder. Defense counsel argued Carrera was guilty of no more than second degree murder. Defense counsel conceded Carrera was guilty of assault on a child causing death.

The court instructed the jury on first and second degree murder (CALCRIM Nos. 520, 521), and assault causing the death of a child (CALCRIM No. 820). The court and counsel discussed whether substantial evidence supported giving instructions on lesser included offenses like voluntary or involuntary manslaughter, but ultimately agreed no evidence supported giving them.

DISCUSSION

Diminished Actuality

The abolition of the diminished capacity defense does not preclude a criminal defendant from arguing he or she did not actually form a required specific intent or specific mental state due to mental impairment. (*People v. Ervin* (2000) 22 Cal.4th 48, 91 (*Ervin*).) Even though sanity is conclusively presumed in the guilt phase, evidence a criminal defendant suffers from mental impairment is still admissible under section 28 ““on the issue of whether or not the accused actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged” (*People v. Elmore* (2014) 59 Cal.4th 121, 139.)

CALCRIM No. 3428, the mental impairment instruction omitted here explains the defense of “diminished actuality.” It states, “You have heard evidence that the defendant may have suffered from a mental (disease[,]/ [or] defect[,]/ [or] disorder). You may consider this evidence only for the limited purpose of deciding whether, at the time of the charged crime, the defendant acted [or failed to act] with the intent or mental state required for that crime. [¶] The People have the burden of proving beyond a reasonable doubt that the defendant acted [or failed to act] with the required intent or mental state, specifically: <insert specific intent or mental state required, e.g., ‘malice aforethought,’ ‘the intent to permanently deprive the owner of his or her property,’ or

‘knowledge that . . .’ >. If the People have not met this burden, you must find the defendant not guilty of <insert name of alleged offense>. [¶] <Repeat this paragraph for each offense requiring specific intent or a specific mental state.> [¶] [Do not consider evidence of mental (disease[,]/ [or] defect[,]/ [or] disorder) when deciding if <insert name of nontarget offense> was a natural and probable consequence of <insert name of target offense>.]” (Boldface omitted.)

Carrera first contends the court had a sua sponte obligation to give CALCRIM No. 3428. Not so. It is an optional pinpoint instruction and the court had no duty to give it absent a request by counsel. (*Ervin, supra*, 22 Cal.4th at p. 91.) We are bound by *Ervin*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450 455.)

Carrera next asserts defense counsel’s failure to request CALCRIM No. 3428 constitutes prejudicial ineffective assistance of counsel. We agree.

A criminal defendant asserting ineffective assistance of counsel must demonstrate deficient performance and resulting prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687, 691-692 (*Strickland*); *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.) The proper measure of attorney performance is reasonableness under prevailing professional norms, and there is a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance. (*In re Thomas* (2006) 37 Cal.4th 1249, 1258.)

In this case, Ward’s guilt phase expert testimony recounted Carrera’s years of mental illness, including her repeated hospitalizations for depression and depression related psychosis and delusions. Ward explained how Carrera’s mental disorders could alter her perceptions and thought processes. Ward even commented on Carrera’s demeanor during the interview with police to draw support for her testimony.

In Ward’s opinion, Carrera drowned Kimberly during a bipolar disorder episode with psychotic and catatonic features. Yet, when the time came to tell the jury how to consider this evidence, counsel apparently overlooked CALCRIM No. 3428.

Moreover, within 30 minutes of receiving the case, the jury sent the court the following question: “Can we get clarification of whether or not we can consider her state of mind during the crime.” After conferring with counsel, the court responded to the jury’s question with the following: “[Carrera’s] state of mind is at issue in both of the charged offenses. You should consider all evidence presented that relates to these state of mind issues. To find [Carrera] guilty of any offense you must be convinced beyond a reasonable doubt that each element of the offense has been proved.”

In addition, after the court responded to the question, the jury requested a readback of testimony from the paramedic who testified Carrera was alert and oriented when he questioned her. The reporter read back the requested testimony at around 4:00 p.m., and the jury retired for the day about an hour later. When they reconvened the next morning, the jury had reached a verdict.

In our view, simply telling the jury Carrera’s state of mind was an issue to be considered was not enough. CALCRIM No. 3428 would have told the jury it could consider evidence of Carrera’s mental impairment to determine whether she had actually formed the specific intent required for premeditated murder. The jury’s question, their request for readback, and their verdict immediately after the readback, all demonstrate Carrera’s mental impairment evidence was critical, and strongly suggests the jury did not know how to properly consider it. Defense counsel’s failure to request the only relevant instruction on the only defense presented caused a void in the jury instructions no other instruction filled.¹

¹ The instruction on first degree murder (CALCRIM No. 521) asked the jury to determine whether Carrera “acted willfully, deliberately, and with premeditation,” and whether she made a decision “rashly, impulsively, or without careful consideration.” The instruction defines the legal terms, but provides no guidance for evidence of mental impairment. In short, the factual question of what effect Carrera’s mental disorders had on her ability to form the specific intent required for murder was not resolved under other properly given instructions. (See *People v. Stewart* (1976) 16 Cal.3d 133, 141.)

The Attorney General argues defense counsel may have forgone CALCRIM No. 3428 as a matter of trial tactics. Generally speaking, courts do not second-guess reasonable tactical decisions. (*In re Thomas, supra*, 37 Cal.4th at p. 1257.) However, we perceive no rational tactical purpose in failing to request the only instruction explaining the relevance of Ward’s testimony. (*People v. Frye* (1998) 18 Cal.4th 894, 979 [record must show no tactical purpose for counsel’s act or omission], disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Nor can defense counsel’s omission be classified as a sensible concession to the evidence. Counsel argued vigorously for second degree murder using the mental impairment evidence. Thus, she did not abandon her trial strategy, she simply failed to request the only jury instruction supporting her defense. This was error, not strategy.

Regarding prejudice, a defendant must show “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” (*Strickland, supra*, 466 U.S. at p. 694.) It ““does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*.” [Citation.]” (*Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1050.)

In our view, there is more than an abstract possibility of a more favorable result than first degree murder in this case with a properly instructed jury. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Rogers* (2006) 39 Cal.4th 826, 867-868; *Ervin, supra*, 22 Cal.4th at p. 91.) As noted above, none of the instructions given told the jury what to do with the evidence of Carrera’s mental impairment. In effect, counsel’s failure to request CALCRIM No. 3428 nullified Ward’s testimony as to count 1.

With respect to count 2, we recognize no published case has applied the diminished actuality defense to the general intent crime of assault on a child causing death. But general intent crimes “may also involve a specific mental state, such as knowledge.” [Citation.]” (*People v. Reyes* (1997) 52 Cal.App.4th 975, 983 (*Reyes*).)

“Among the several definitions of “knowledge” are the following: “the fact or condition of being cognizant, conscious, or aware of something”; “the scope of one’s awareness”; “extent of one’s understanding”; “the fact or condition of apprehending truth, fact, or reality immediately with the mind or senses.” [Citations.]’ [Citation.]” (*Reyes, supra*, 52 Cal.App.4th at p. 983.)

And there is a knowledge or awareness element in count 2. As the court instructed the jury, the People were required to prove, among other things, that: “When [Carrera] acted, [she] was aware of facts that would lead a reasonable person to realize that [her] act by its nature would directly and probably result in great bodily injury to the child” (CALCRIM No. 820.) Surely evidence of Carrera’s mental impairment was relevant to her awareness of those facts. So CALCRIM No. 3428 would apply here too.

But even if the diminished actuality defense and CALCRIM No. 3428 are not applicable to assault on a child causing death, there are other reasons to reverse count 2. Defense counsel’s failure to request the only pertinent jury instruction on mental impairment eviscerated her client’s defense to count 1, and she mounted no defense to count 2. As she told the jury during closing argument, “I am not even going to [argue] count 2. I submit to you it is there.” While this could have been a matter of sound trial tactics, we cannot make that assumption in light of defense counsel’s complete failure to competently present the defense of diminished actuality. (See *Strickland, supra*, 466 U.S. at p. 694.)

For all of these reasons we conclude the general presumption in favor of counsel’s trial tactics has been rebutted, and the guilt phase judgment must be reversed for ineffective assistance. We simply have no confidence in the outcome of this trial.

Finally, reversal of the guilt phase judgment also requires the retrial of Carreras’s sanity phase. (See *People v. James* (2015) 238 Cal.App.4th 794, 813, fn. 6 [“In the eyes of the law there is only one trial even though it is divided into two sections or stages if insanity is pleaded as a defense”].)

DISPOSITION

The judgment is reversed, and the matter is remanded for a new trial.
Pursuant to Business and Professions Code section 6086.7, subdivision (a)(2), the clerk of this court is directed to forward to the State Bar a copy of this opinion.

THOMPSON, J.

WE CONCUR:

O'LEARY, P. J.

MOORE, J.